

Original

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of sections 3(n)
and 332 of the Communications Act)

Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

To: The Commission

REPLY COMMENTS OF THE RURAL CELLULAR ASSOCIATION

The Rural Cellular Association ("RCA"), pursuant to 1.415 of the Commission's rules, on behalf of itself and its members, replies to the comments filed in the above captioned proceeding.

Seventy five parties filed comments in response to the NPRM, including the RCA, on November 8, 1993. The RCA replies to those comments with respect to two issues. First, the RCA rearticulates its position that Personal Communications Services ("PCS") and other new technologies should be classified as commercial regardless of whether the licensee seeks also to provide private service on the same frequencies. Second, the RCA supports an immediate lift of the dispatch prohibition on existing common carriers. In support, the following is respectively shown:

I. PCS should be classified as commercial regardless of whether the licensee seeks also to provide private service over the frequencies.

1. In its comments, the RCA urged that to the extent that PCS or any mobile service interconnects to the public switched network, and is offered for profit, it should be classified as a

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commercial mobile service. The RCA explained that the determination of regulatory status should turn on the statutory definition of the service and should not be left to the choice of the provider. To the extent that a PCS licensee desires to provide private service on the same frequencies used to provide commercial service, the RCA urged the Commission to treat it as a commercial mobile service provider. The RCA explained that administering dual regulation of the PCS spectrum would be an administrative nightmare. Moreover, the RCA expressed concern that PCS providers would be at a regulatory advantage over other commercial service providers if permitted to use their spectrum for private and commercial mobile service.

2. The comments in this proceeding have not convinced the RCA to change its position. As is explained below, a self-designation policy would be inconsistent with Congress's newly created statutory framework which attempts to achieve regulatory parity for functionally equivalent services. In addition, the public interest does not support the policy. Rather, such a policy will create a serious administrative procedural burden and a potential for abuse of the Commission's processes. Accordingly, the RCA remains opposed to a policy of self-designation for PCS.

A. A self-designation policy is contrary to the new regulatory framework.

1. A self-designation policy will create a serious administrative procedural burden.

3. The RCA urges Commission not to permit a PCS applicant to initially "choose" its regulatory classification. Allowing this

choice will create serious procedural problems inasmuch as it conflicts with the Commission's competitive bidding rulemaking proceeding. While most commenting parties support the RCA's position against a self-designation policy for similar reasons¹, several parties who in theory support the policy, do not explain how such a policy can be practically implemented.²

4. Some Commenters support a self-designation proposal stating that since carriers will bid on spectrum and be required to pay for it, they should have the flexibility to change the uses to which it is put. See Comments of NTCA, p. 4. While the RCA agrees that licensees should have this flexibility, the Commission should ensure that the provision of any such flexibility does not provide some licensees unfair competitive advantage in the provision of competitive services. Moreover, flexibility in the licensing of PCS spectrum would conflict with the Commission's competitive bidding proceeding.

5. A PCS licensee that desires to provide a private service that is not-for-profit will not obtain its license through an

¹ See comments of American Mobile Telecommunications Association, Inc. ("AMTA"), pp. 18-19; MCI Telecommunications Corporation, pp. 4-5; Nextel Communications, Inc. ("Nextel"), pp. 17-18; Southwestern Bell Corporation ("SWB"), pp. 17-20; United States Telephone Association, ("USTA") pp. 9-10; and Vanguard Cellular Systems, Inc., pp. 13-14.

² See comments of Cellular Telecommunications Industry Association, p. 17-18; McCaw Cellular, Inc., p. 12, and Telocator, p. 17-18, who each support a flexible licensing approach but state that the policy must also be extended to cellular carriers. See also, comments of Motorola, Inc., pp. 11-12, and the National Telephone Cooperative Association, pp. 4-5, who both support a self-designation policy.

auction process.³ The competitive bidding rules exempt private not-for-profit services from the competitive bidding procedures. See Section 309(j)(2)(a). Accordingly, a PCS licensee can only provide a for-profit service on spectrum obtained through the competitive bidding process. While there are some for-profit services that are private, such a division of service in PCS is contrary to the new regulatory framework which contemplates that PCS spectrum will be auctioned.

6. The administrative distinction of private and commercial services within PCS will impose a significant administrative procedural burden on the Commission. The Commission will first have to classify private services according to whether the service is for-profit or not-for-profit. Next, the Commission will have to decide how to award not-for-profit PCS licenses that are exempt from competitive bidding. To do so, the Commission will have to decide how much spectrum it intends to designate for that private use, and explain how it intends to choose between proposals of applicants. Allowing the choice of regulatory status prior to an

³ See In the Matter of the Implementation of Section 309(j) of the Communications Act Competitive Bidding, ("Competitive Bidding NPRM") PP Docket No. 93-23, Notice of Proposed Rule Making, released October 12, 1993. The "private services" excluded from competitive bidding are solely those services that do not involve the receipt of compensation from subscribers. This definition differs from the definition used in the regulatory treatment NPRM proceeding. There is a distinction between "private services" and "private mobile services." Accordingly, there are some private mobile services that are for-profit, and subject to the competitive bidding procedures. There are other private mobile services that are used solely for internal use and do not involve the receipt of any compensation. These private services are exempt from the competitive bidding procedures.

auction could adversely affect the integrity of the entire PCS licensing process.⁴

7. More importantly, the policy behind the competitive bidding process will be frustrated by the self-designation policy since certain private services cannot be auctioned. The bidding process is designed to promote the development and rapid deployment of new technologies, products and services for the benefit of the public, without judicial delays.⁵ If the FCC is required to make case-by-case determinations as to whether a proposed use of spectrum is a private system that can be auctioned, delays will be inherent in the process. As a result, the competitive bidding process will not promote the rapid deployment of PCS, and will significantly delay it.

2. A self-designation policy could foster a potential for abuse of process.

8. In addition to the procedural problems discussed above, a self-designation policy could also create a serious potential for abuse of process. The RCA reminds the Commission that one reason for Congress' initiation of the regulatory proceeding, and a primary objective in revising Section 332, was to ensure that PCS is regulated as a commercial service and that PCS licensees will not escape the obligations of a common carrier by securing private

⁴ As will be explained below, allowing PCS licensees to change regulatory status after obtaining a license whether or not the license is obtained through an auction, creates additional procedural problems and a potential for abuse of process.

⁵ See Competitive Rulemaking NPRM, para. 12.

carrier status.⁶ A self-designation policy, or the ability to change regulatory status during the term of a license, could permit PCS licensees to avoid the public interest obligations associated with common carrier status. Moreover, licensees seeking to circumvent the competitive bidding process could apply as a private service provider and then later convert that system to a commercial system, thereby avoiding an auction. Such a practice is unfair and does not serve the legislative mandate to generate revenues set forth in the Omnibus Budget Act of 1993.

3. A self-designation policy will create new regulatory inequalities without serving the public interest.

9. While the procedural problems discussed above already present substantial barriers to a self-designation policy, the public interest does not justify overcoming these barriers. Motorola suggests that a self-designation policy will serve the public interest by promoting full spectrum utilization and a diverse range of customer choices that will allow PCS licensees to tailor services to satisfy all demands of the marketplace. See

⁶ As explained in the comments of Nextel Communications, in a floor debate on the House Energy and Commerce Committee Bill on H.R.2264, Congressman Markey stated,

"A fundamental regulatory step that this legislation takes is to preserve the core principle of common carriage as we move into a new world of service such as PCS...The fact that this legislation ensures PCS, the next generation of communications, will be treated as a common carrier is an important win for consumers... and for those who seek to carry those core notions of nondiscrimination and common carriage into the future."

Congressional Record, H3287, May 27, 1993. See also, Nextel Comments, p. 17.

Comments of Motorola, Inc., p. 12. The RCA disagrees.

10. It is not necessary to enact a self-designation policy to promote full spectrum utilization and diversity of service. Rather, the RCA believes that fair competition between commercial mobile service providers will promote full spectrum utilization and diversity of service. Historically, competition has forced licensees to strive to meet customer needs to survive in the marketplace. By allowing PCS providers to choose their regulatory status, PCS licensees will be afforded a regulatory advantage over other commercial mobile service providers. This regulatory advantage will automatically suppress competition and could prevent diversity of service.

11. In addition, a self-designation policy would frustrate Congress' attempt to correct and prevent the inequities of differing regulation of similar services. The Commission has always contemplated that PCS would compete with mobile services such as cellular. Self-designation would give PCS providers a regulatory advantage to provide additional services that other commercial mobile service providers may not provide, creating new and profound regulatory inequalities. Such an advantage directly contradicts the regulatory parity proceeding without serving any public interest. The policy is, therefore, clearly inconsistent with the new statutory framework.

12. The RCA proposes that the Commission initially license all PCS providers as commercial mobile service providers. If the Commission determines that a significant need exists for private

not-for-profit services, the Commission could set aside spectrum for services which will meet the specific need and promulgate rules to process such applications.

13. In the event the Commission determine that PCS licensees should be permitted to provide for-profit private mobile services because the marketplace dictates such a need, the Commission ought to permit it only on a secondary basis. To be consistent with the new statutory framework, and ensure an equal regulatory footing, the Commission must permit all commercial service providers to do the same. This policy would clearly promote, through fair competition, the efficient and intensive use of spectrum and diversity of service. In addition, it would assure that PCS does not escape common carrier treatment and that the public interest would be served by the promotion of economic opportunity and competition.

II. Commercial mobile service providers should be permitted to provide dispatch service over their common carrier frequencies.

14. In its comments, the RCA urged the Commission to lift the restriction on existing common carriers who are classified as commercial mobile service providers to provide dispatch service. Many commenting parties agree with the Commission's proposal to lift this restriction.⁷ However, several parties request that the Commission wait for a three year transition period in order to reclassify licensees as commercial mobile service providers prior

⁷ See Comments of Bell Atlantic Companies, p. 18; MCI, pp. 6-7; Motorola, p. 12; Nextel, pp. 18-19; SWB, pp. 21-22; and Telocator, p. 17.

to lifting the dispatch restriction.⁸ Specifically, Nextel asserts that the three year transition period is necessary for private carriers to adjust their operations to the regulatory and competitive realities of commercial mobile service.⁹ The RCA disagrees.

15. The Congressional intent in creating a new regulatory framework was to create regulatory parity for functionally similar services. Accordingly, private carrier services that will be reclassified as commercial are the functional equivalent of existing common carrier mobile services. As such, they currently compete with commercial services with the advantage of providing dispatch service and without the additional obligations imposed on common carriers. The Commission has proposed providing private carriers with a three year transition period before they are subject to common carrier obligations to help them adjust to their new regulatory status. Because of this three year transition period, no additional transition period should be imposed for lifting the dispatch prohibition against common carriers. Common carriers will continue to operate at a competitive disadvantage for three years inasmuch as private carriers will not be subject to the common carrier obligations during this transition period. Common carriers should not be further disadvantaged by a delay in the provision of dispatch service.

⁸ See Comments of Nextel, p. 19; Motorola, Inc., p. 13; and, AMTA, p. 22.

⁹ See Comments of Nextel, p. 19.

16. In addition, the elimination of the dispatch prohibition will give subscribers greater flexibility and choice among services, clearly serving the public interest. Obviously, increased competition will lower the cost of service to subscribers. At the same time, existing common carriers will have greater flexibility to meet their subscriber needs and use their spectrum more efficiently.


III. Conclusion.

17. As demonstrated above, a self-designation policy for PCS is (1) contrary to the Congressional intent behind the revision of Section 332 to create a new statutory framework; (2) will create a serious administrative procedural burden; (3) will create inequalities between similar services inconsistent with achieving regulatory parity; and (4) will create a serious potential for abuse of the Commission's processes. Accordingly, all PCS providers should be required to provide commercial mobile service on a primary basis. In addition, the Commission should immediately lift the prohibition on the provision of dispatch service on existing common carriers to achieve regulatory parity.

For these reasons, the Commission's adoption of the recommendations set forth above will serve the public interest.

Respectfully submitted,

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